Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SOUTHWIRE COMPANY,

Petitioner,

v.

JOHN STEPHEN JANOWICK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440-441 (1999), this Court held that participants in a defined benefit pension plan have a "right only to their 'accrued benefit,'" and "have no entitlement to share in a plan's surplus...." The United States Courts of Appeals for the D.C. Circuit and the Seventh Circuit have both since looked to the governing trust and related documents to determine the rightful owner of proceeds arising from the demutualization of an insurance company in connection with ERISA benefit plans. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 177 (D.C. Cir. 2006); *RLJCS Enters., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan and Trust*, – F.3d –, 2007 WL 1262010 *5 (7th Cir. 2007).

The question presented is whether, when an ERISA plan trustee receives demutualization proceeds, the proceeds are distributed based upon the benefit plan and other related documents as held by the D.C. Circuit and the Seventh Circuit, or instead are payable to the plan participants in excess of their accrued benefit, under the different standard applied by the Sixth Circuit below, which did not consider the governing trust documents?

PARTIES TO THE PROCEEDING

Petitioner is Southwire Company ("Southwire"), interpleader defendant in the district court and appellee before the United States Court of Appeals for the Sixth Circuit. Southwire is the sponsor of the National-Southwire Aluminum Company Pension Plan ("the Southwire Plan") – a now terminated defined benefit pension plan funded solely by Southwire.

Respondents are John Stephen Janowick, Gary Erwin and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542 (collectively "the Annuitants"), and Century Aluminum Company ("Century"), both interpleader defendants in the district court and appellants before the Sixth Circuit. The Annuitants were participants in Southwire's terminated pension plan and are the individual third-party beneficiaries under the group annuity contracts purchased to satisfy all benefit liabilities under the Southwire Plan upon its termination. Century purchased Southwire's Hawesville, Kentucky aluminum smelting plant and its operating assets fifteen years after termination of the Southwire Plan.

Bank of New York ("BNY"), as successor to the Irving Trust Company ("Irving Trust"), the former trustee for the Southwire Plan, was the interpleader plaintiff at the district court. BNY was dismissed as a party by the district court after it paid the funds in question into the registry of the district court.

RULE 29.6 STATEMENT

Southwire is not a subsidiary or an affiliate of a publicly owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Southwire respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Sixth Circuit are reported at 470 F.3d 264 and are reprinted in the appendix hereto ("App.") at 1a. The district court's two memoranda and opinions granting summary judgment in favor of Southwire on its claim for entitlement to the demutualization proceeds are unreported and are reprinted at App. 22a-41a.

JURISDICTION

The judgment of the Sixth Circuit was entered on November 22, 2006. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 26, 2007. App. 20a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provision, 29 U.S.C. § 1002(35), 29 U.S.C. § 1104(a)(1), and 29 U.S.C. § U.S.C. § 1344(d), are set forth at App. 42a-48a.

INTRODUCTION

This petition asks the Court to resolve a conflict between the decision below and this Court's decision in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, as well as a deepening conflict among the Federal Courts of Appeals

concerning the legal principles that govern the ownership of proceeds received by a benefit plan trustee as the holder of group annuity contracts when the insurance company that issued the contracts demutualizes ("Demutualization Proceeds").

Here, the Sixth Circuit invoked several alternative legal theories to award the Demutualization Proceeds to the Annuitants, thereby providing them with a benefit in excess of the accrued benefits to which they are legally entitled. In doing so, the Sixth Circuit failed to correctly apply this Court's holding in *Hughes Aircraft* that participants in a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and have no right to the surplus assets of a trust underlying the plan. *Id.* at 440-41.

In contrast, the D.C. Circuit and the Seventh Circuit recently held that individual participants in employee benefit plans funded through group insurance policies are not entitled to demutualization proceeds received after the demutualization of the insurance company which underwrote the plan, and that the proceeds instead belonged to the plan trust which purchased the policies. *See Stewart v. Nat'l Educ. Ass'n*, 471 F.3d at 177; *RLJCS Enters.*, 2007 WL 1262010 at *5 (concluding that a trust that paid the premiums for a group life insurance policy was the "owner" of the policy and the demutualization proceeds flowing from the policy). Unlike these other courts that have addressed this issue, the Sixth Circuit disregarded the nature of the plan as a defined benefit plan, as well as the consideration of which party funded the group annuity contracts. *See Hughes Aircraft*, 525 U.S. at 439; *Stewart*, 471 F.3d at 177; *RLJCS Enters.*, 2007 WL 1262010 at *5.

The Sixth Circuit's decision also conflicts with and overlooks established trust law principles recognized by this Court which served as the basis for the district court's

conclusion that Southwire,[1] as the plan sponsor that solely funded the trust used to purchase the group annuity contracts, was the rightful owner of the demutualization proceeds. This Court's decisions in *Hughes Aircraft*, 525 U.S. at 443; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), establish that when an employer terminates a pension plan, its actions are analogous to that of a settlor of a trust. Correspondingly, this Court's decisions in *Varity Crop. v. Howe*, 516 U.S. 498 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1988); and *Central States, South East & South West Areas Pension Fund v. Central Transportation, Inc.*, 472 U.S. 559 (1985), stand for the proposition that under traditional principles of trust law, a trustee has only those duties imposed and powers conferred by the trust documents and those implicit powers necessary or appropriate for carrying out the purposes of the trust. Here, the Sixth Circuit failed to consider or discuss this established precedent that trust law principles should be applied to determine how to distribute property coming into possession of a trustee.

As explained in more detail below, courts around the country are applying a variety of different legal principles and reaching conflicting conclusions regarding the rightful owner of demutualization proceeds. The decision of the Sixth Circuit in this case will only cause further confusion and conflict among the courts of appeals. This Court should resolve the Question Presented to ensure uniform application of the law applicable to the appropriate distribution of demutualization proceeds received by benefit plans.

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[1] As used herein, "Southwire" shall refer to Southwire Company and to its current and former subsidiaries and affiliates, unless the context plainly requires otherwise.

STATEMENT OF THE CASE

A. Factual Background

1. Nature of the Southwire Plan

National-Southwire Aluminum Company, then a subsidiary of Southwire, established the Southwire Plan for the benefit of its eligible employees, effective July 1, 1970. App. 3a. When ERISA was enacted, the Southwire Plan constituted a "defined benefit plan" within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35). Section 403 of ERISA required that the assets of the Southwire Plan be held in trust. Southwire arranged for Irving Trust to serve as trustee for the Plan. App. 3a. In accordance with Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D), Irving Trust as trustee of the Plan, held the Plan assets pursuant to the terms of the Plan, the governing trust instrument. BNY, Plaintiff in this interpleader action, is the successor to Irving Trust.

The Southwire Plan was a "defined benefit" pension plan, providing a fixed amount of monthly retirement income for eligible employees and their beneficiaries in accordance with the Plan's benefit formula. App. 3a. Southwire bore the entire cost of the Southwire Plan by making periodic contributions in amounts sufficient to meet the applicable funding requirements of Section 412 of the Internal Revenue Code of 1986, as amended ("Code"), 26 U.S.C. § 412, and Section 302 of ERISA, 29 U.S.C. § 1082. The employees made no financial contributions to the Southwire Plan. App. 32a. Pursuant to Article VII of the Southwire Plan and Title I, Subtitle A, Part 3 of ERISA, Southwire bore the sole risk and obligation of ensuring that the Southwire Plan could pay all accrued benefits to the participants and their beneficiaries. If insufficient assets had been available to satisfy the benefit liabilities accrued under the Southwire Plan, Southwire

would have been solely responsible for providing additional sums to meet the benefit obligations. App. 32a.

2. *Termination of the Southwire Plan and Purchase of Annuity Contracts*

Southwire maintained and funded the Southwire Plan continuously from 1970 until 1986. On October 24, 1986, Southwire announced to affected participants that the Southwire Plan would be terminated effective December 31, 1986.[2] App. 33a. On November 17, 1986, Southwire notified the Pension Benefit Guaranty Corporation that it intended to terminate the fully-funded Southwire Plan pursuant to a "standard termination" under Section 4041(b) of ERISA, 29 U.S.C. § 1341(b). When a defined benefit pension plan voluntarily terminates in a standard termination, the plan sponsor is required to purchase an "irrevocable commitment" from an insurance company to satisfy all benefit liabilities under the plan. In accordance with this requirement, Irving Trust, as trustee for the Southwire Plan, purchased irrevocable commitments from Prudential Insurance Company of America ("Prudential") in the form of group annuity contracts GA-5542 and GA-5543 (the "Group Annuity Contracts"), at a total cost of $7,908,495. App. 4a. In so doing, Irving Trust completely satisfied the Southwire Plan's liabilities to participants as well as its fiduciary obligation to the participants under the trust and the provisions of ERISA.

The Group Annuity Contracts expressly state that the contract-holder for each contract is "Irving Trust Company, as Trustee" for National-Southwire Aluminum Company

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[2] After the Southwire Plan's termination, Southwire established a new defined benefit pension plan for participants, effective January 1, 1987, ensuring that eligible employees could continue to accrue pension benefits going forward.

Pension Plan." App. 33a. Individual certificates issued to the Annuitants by Prudential ("Certificates") also state that the contract-holder of the Group Annuity Contracts was "Irving Trust, as Trustee" for the Southwire Plan.[3]

The Southwire Plan expressly provided that any surplus funds remaining after the termination and the satisfaction of its benefit obligations were to be returned to Southwire. Specifically, as permitted by Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), Section 9.2 of the Southwire Plan states:

> Any funds remaining after the satisfaction of all liabilities with respect to Participants, retired Participants, vested and terminated Participants, and beneficiaries under the Plan shall be returned to NSA [*i.e.*, to Southwire].

App. 50a.

After its purchase of the Group Annuity Contracts, Irving Trust held all remaining assets in the Southwire Plan in trust for the only remaining "beneficiary" under the Southwire Plan's terms – Southwire, the "settlor." After the purchase of the Group Annuity Contracts, all known remaining assets in the Southwire Plan, except those necessary to cover the trustee's administrative expenses, reverted to Southwire pursuant to Section 9.2 of the Plan, as

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[3] No party has questioned the legality of Irving Trust's satisfaction of the Southwire Plan's benefit obligations through the purchase of group annuity contracts from a mutual insurance company – as opposed to individual insurance contracts from a stock insurance company.

permitted and required by federal law (29 U.S.C. §§ 1104(a)(1)(D) and 1344(d)(1)).[4] App. 33a.

3. The Demutualization of Prudential

On December 15, 2000, the Prudential Board of Directors adopted a Plan of Reorganization under Chapter 17 of Title 17 of the New Jersey Revised Statutes, which included a plan to convert Prudential from a mutual insurance company to a stock company through a process known as "demutualization." App. 5a. As a mutual life insurance company, Prudential had no shareholders. Instead, Prudential was owned by the contract holders of Prudential policies and annuity contracts, with rights as to voting and participation in any distribution of the surplus of Prudential. As part of the demutualization process, and pursuant to applicable New Jersey law, a mutual company must provide shares of stock in exchange for the ownership interests of policyholders and contract holders in the mutual company. App. 5a.

As required by its demutualization plan, Prudential issued 35,199 shares of stock to BNY (as successor to Irving Trust, the Southwire Plan's trustee and the designated contract holder of the Group Annuity Contracts), representing its ownership interest in Prudential attributable to the Group Annuity Contracts purchased upon termination of the Southwire Plan. App. 5a. BNY received this stock as successor to "Irving Trust, as Trustee" of the Southwire Plan. The shares of stock issued by Prudential had no effect on the

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[4] Because the Sixth Circuit found the Annuitants were entitled to the surplus Demutualization Proceeds in the trust underlying the terminated Southwire Plan, and found Century's claim to the Demutualization Proceeds to be moot, this Statement of the Case will not detail the provisions of Southwire's subsequent sale of its Hawesville plant to Century.

Group Annuity Contracts, and the benefit obligations to the former participants and beneficiaries of the Southwire Plan remained fully satisfied by the Group Annuity Contracts.

Upon receipt of conflicting claims for the Demutualization Proceeds, BNY sold the shares of Prudential stock and deposited $1,357,703.69 into the registry of the district court. App. 43a.

B. Procedural History

1. District Court Proceedings

BNY filed this interpleader action (pursuant to 28 U.S.C. § 1335 and Fed. R. Civ. P. 23) to resolve the conflicting claims as to the ownership of the Demutualization Proceeds received from Prudential among the parties to this action: (i) Southwire, the plan sponsor; (ii) the Annuitants, participants in the Southwire Plan and third-party beneficiaries under the Group Annuity Contracts; and (iii) Century, which acquired Southwire's Hawesville, Kentucky aluminum smelting plant and its operating assets in 2001, fifteen years after the Plan's termination. App. 5a.

The district court adjudicated the parties' conflicting claims in two phases. In phase one, the district court determined that, as between Southwire and the Annuitants, Southwire was entitled to the Demutualization Proceeds based on fundamental principles of trust law, the express reversion provision in the pension plan, and the terms of the Group Annuity Contracts. App. 39a-40a. The district court noted that BNY came into possession of the Demutualization Proceeds in its capacity as the trustee of a terminated pension plan and trust that unequivocally provided for the reversion to Southwire of any funds remaining after the satisfaction of all liabilities to the Southwire Plan's participants. App. 40a.

In addition, the involved pension trust was funded solely by contributions from Southwire. The Annuitants themselves neither made, nor were permitted to make, any contributions to the plan. App. 32a. The purchase of the two Group Annuity Contracts entirely satisfied the trust's pension liabilities to the Annuitants, both pursuant to the terms of the plan itself and applicable federal law. As such, the district court concluded that the Demutualization Proceeds "should be returned to the settlor of the trust pursuant to trust law and the terms of the document which created the trust" and granted Southwire's motion for partial summary judgment. App. 40a.

In the second phase, the district court determined that Southwire's claim to the Demutualization Proceeds was superior to Century's and again granted Southwire's motion for partial summary judgment. App. 23a.

2. The Sixth Circuit Proceedings

The Annuitants and Century appealed, and the two appeals were consolidated. A divided panel of the Sixth Circuit reversed, holding that the Annuitants were entitled to the Demutualization Proceeds, and dismissed Century's appeal as moot. The Sixth Circuit majority failed to correctly apply this Court's decision in *Hughes Aircraft* holding that plan participants in a defined benefit pension plan have only a right to their accrued benefits and are not entitled to the plan's surplus assets. 525 U.S. at 440-41. The majority decision results in the Annuitants receiving their accrued benefits *plus* the Demutualizaton Proceeds.

In addition, although the Group Annuity Contracts expressly designated Irving Trust as contract holder of the annuity contracts in its capacity as "trustee" of the Southwire Plan, the Sixth Circuit majority discounted the significance of that fact, as well as the legal rights and responsibilities

imposed in connection with a trustee's service in that capacity. Instead, the majority incorrectly concluded that because Southwire was not a party to, or a beneficiary of, the contracts, the parties must have intended that the Annuitants would become the contract holders in the event Irving Trust stepped down. App. 11a-12a. Based on this conclusion, the majority held that the Annuitants were entitled to the Demutualization Proceeds. App. 3a.

The majority opinion also reasoned that because the Group Annuity Contracts were silent regarding demutualization, RESTATEMENT (SECOND) OF CONTRACTS § 204 could be used to supply a missing term to the Group Annuity Contracts entitling the Annuitants to the Demutualization Proceeds. App. 14a-15a. Finally, the majority concluded that that the nature of demutualization entitled the Annuitants to the Demutualization Proceeds. App. 15a-18a.

In her dissent, Judge Batchelder disagreed with the majority's reasoning and its conclusion, noting that the majority opinion's decision was "foreclosed" by this Court's decision in *Hughes Aircraft*. Recognizing the error in the majority's legal approach and analysis, Judge Batchelder concluded: "I would affirm the decision of the district court and hold that this money represents surplus assets of a defined benefit plan, which was paid into the trust by the employer and must be returned to the employer as trust settlor." App. 19a.

REASONS FOR GRANTING THE WRIT

This Court should grant review for at least three reasons.

First, as noted in Judge Batchelder's dissenting opinion, the outcome adopted by the majority opinion "is

foreclosed by" this Court's decision in *Hughes Aircraft*. App. 19a. In *Hughes Aircraft*, this Court held that plan participants in a defined benefit pension plan have only a right to a certain defined level of benefits (*i.e.*, "accrued benefits") and have no claim or entitlement to a plan's surplus assets. *Id.* at 440-41. The majority failed to follow this Court's direction in *Hughes Aircraft*, instead crafting multiple alternative theories to award the Annuitants amounts that exceed the accrued benefits to which they are legally entitled. This outcome is contrary to a central proposition of *Hughes Aircraft*.

Second, the majority opinion also conflicts with decisions of the D.C. Circuit and the Seventh Circuit. Those courts have held that the individual insureds under an employee benefit plan funded through a group insurance policy have no ownership interest in demutualization proceeds received after the demutualization of the insurance company which underwrote the plan. Instead, the demutualization proceeds must be distributed in accordance with the plan and related documents. *See Stewart*, 471 F.3d at 177;[5] *RLJCS Enters.*, 2007 WL 1262010 at *5.

Third, the majority decision conflicts with and overlooks this Court's precedent establishing that trust law principles (which served as the basis for the district court's conclusion that Southwire was the rightful owner of the Demutualization Proceeds) dictate the disposition of stock coming into a trustee's possession in the context of a benefit plan.

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[5] The D.C. Circuit in *Stewart* distinguished the Sixth Circuit's majority opinion in this case in two ways, noting that the group life insurance plan was ongoing and that the participant had not disputed that the plan administrator was the contract-holder. While Southwire acknowledges these factual differences, they are immaterial to the outcome of this case, for the reasons explained *infra*.

The Sixth Circuit's decision thus is inconsistent with this Court's holding in *Hughes Aircraft* and also creates a conflict among the Circuits concerning the proper legal principles applicable to a determination of the rightful owner of demutualization proceeds under the circumstances.

I. THE MAJORITY DECISION BELOW IS INCONSISTENT WITH *HUGHES AIRCRAFT.*

The majority decision erroneously concludes, in conflict with this Court's decision in *Hughes Aircraft*, that the Annuitants are the rightful owners of the Demutualization Proceeds. In *Hughes Aircraft*, this Court held that plan participants in a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and nothing more. 525 U.S. at 439-41. This Court in *Hughes Aircraft* also noted the importance of the distinction between a "defined contribution" and a "defined benefit" pension plan in determining the rights of plan participants. *Id.* at 439.

A defined contribution plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account." *Id.* (quoting Section 3(34) of ERISA, 29 U.S.C. § 1002(34). Under a defined contribution plan, a "beneficiary is entitled to whatever assets are dedicated to his individual account." 525 U.S. at 439.

In contrast, a defined benefit plan consists of a general pool of assets and provides each participant a fixed periodic payment upon retirement. *Id.* The benefit plan's actual investment experience, good or bad, has no effect on the employees' benefit entitlement. Participating participants are entitled to their defined level of accrued benefits only and have no interest in any plan surplus. *Id.* at 440-41.

Although the pension plan in *Hughes Aircraft* was ongoing rather than terminated, the facts this Court considered in *Hughes Aircraft* are instructive, and the Court's primary holding is controlling in this case. Faced with a pension plan overfunded in excess of $1 billion, the plan sponsor in *Hughes Aircraft* amended its defined benefit pension plan to eliminate the employee contribution requirement and to institute a new early retirement program and a noncontributory plan structure. Several employees contended that the plan sponsor violated ERISA by using assets from the surplus attributable to the employees' contributions to fund the new noncontributory structure. *Id.*

With respect to a defined benefit plan, Section 204(c)(2)(B) of ERISA provides that a participant has a nonforfeitable right to the greater of (1) the benefits provided under the plan or (2) an amount derived from the employee's accumulated contributions, determined using an interest rate fixed by statute. 29 U.S.C. § 1054(c)(2)(B). Under this structure, this Court concluded that "plan members generally have a nonforfeitable right only to their 'accrued benefit,' so that a plan's actual investment experience does not affect their statutory entitlement." *Hughes Aircraft*, 525 U.S. at 440. Furthermore, the Court held that "[s]ince a decline in the value of a plan's assets does not alter accrued benefits, members similarly ***have no entitlement to share in a plan's surplus*** – even if it is partially attributable to the investment growth of their contributions." *Id.* at 440-41 (emphasis added). In sum, so long as participants under a defined benefit plan receive their accrued benefit, they have no entitlement to any further benefit from the plan–even funds generated through investment of their own contributions.

Here, despite its conclusion to the contrary, the Sixth Circuit majority opinion cited no authority for the proposition that the Annuitants are entitled to anything more than their accrued benefits under the Southwire Plan. The

majority disregarded *Hughes Aircraft* on the ground that this Court's decision involved an ongoing plan, rather than a terminated plan. However, there is no principled basis for the majority's refusal to apply *Hughes Aircraft*. It is undisputed that the Group Annuity Contracts designated Irving Trust as the contract holder in its capacity as Trustee of the Southwire Plan, and that BNY came into possession of the Demutualization Proceeds in its capacity as successor-in-interest to the trustee of the Southwire Plan. Because the contract holder of the Prudential annuity contracts served solely in its capacity as trustee of the Southwire Plan, it makes no difference whether the Plan was ongoing or terminated. In either event, the provisions of the Southwire Plan continue to govern the relationship among the trust settlor, trustee, and participants, and dictates the rights and obligations of the trustee with respect to disposition of any funds coming into the trustee's possession, including the Demutualization Proceeds.

The Sixth Circuit majority also disregarded the important consideration of which party paid for the principal giving rise to the Demutualization Proceeds. Southwire sponsored a defined benefit plan. The Plan was financed entirely by Southwire – with no contributions from the Annuitants. Plan assets were used to purchase the Group Annuity Contracts from Prudential to fully fund the participants' accrued benefits. Therefore, unlike the plaintiffs in *Hughes Aircraft*, the Annuitants have no argument that any money belonging to them was used to purchase the group annuities which created the Demutualization Proceeds at issue. But for the use of Southwire's contributions (in excess of $7 million) to purchase the Group Annuity Contracts, no Demutualization Proceeds would exist. Moreover, through the annuities provided under the Group Annuity Contracts, the Annuitants undisputedly received everything to which they are entitled

under the Southwire Plan and ERISA. Based on this Court's decision in *Hughes Aircraft*, they are entitled to nothing more.

The decision below unquestionably provides the Annuitants with more than their accrued benefits under the defined benefit Southwire Plan. This Court should grant review and reject the Sixth Circuit's attempt to create an exception to *Hughes Aircraft*, which compels the conclusion that the Annuitants are not entitled to the Demutualization Proceeds.

II. THE COURTS OF APPEALS ARE IN CONFLICT ON THE PROPER LEGAL ANALYSIS TO USE IN DETERMINING THE RIGHTFUL OWNER TO DEMUTUALIZATION PROCEEDS FLOWING FROM A BENEFIT PLAN.

As mutual insurance companies have demutualized, courts around the country have wrestled with disputes over the ownership of demutualization proceeds, including from the demutualization of Prudential and particularly when benefit plans are involved. *See, e.g., Daniels v. Bursey*, 313 F. Supp. 2d 790 (N.D. Ill. 2004)(evaluating RICO, ERISA and fraud claims related to demutualization). The lesson learned from these cases is not whether the employer or the employee "wins," but what legal principles courts should use in their analysis. The courts that have determined the ownership of demutualization proceeds when benefit plans are involved have focused on the nature of the benefit plan in question and the concept of surplus plan assets. The proper framework involves (i) analyzing the applicable plan documents regarding how plan assets and surplus funds are

to be treated;[6] and (ii) analyzing both the assets of the benefit plan and the ownership of demutualization proceeds under ordinary notions of property rights.[7]

Thus, in any demutualization scenario, a court must review plan documents and any other legal agreement among the contesting parties. The determination of ownership depends on the corporate structure of a given plan and the terms of the relevant documents. The Sixth Circuit's majority decision, however, ignored the plan documents, the nature of the plan as a defined benefit plan, and the key issue of which party paid for the Group Annuity Contracts, creating a conflict among the Circuits regarding the applicable legal principles to be used in determining the appropriate disposition of demutualization proceeds. The majority decision conflicts with the analysis used by other courts that have addressed this issue.

For example, in *Stewart*, the National Education Association ("NEA"), the plan administrator of the National Education Association Members Insurance Trust ("NEA Trust"), sponsored a voluntary members insurance plan providing benefits in the event of death, accident, sickness,

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[6] *See RLJCS Enterprises, Inc. v. Prof'l Benefit Trust, Inc.*, 438 F. Supp. 2d at 903, 909-10 (N.D. Ill. 2006), *aff'd*, -F.3d-, 2007 WL 1262010 at *2-3 (citing *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters, No. 02-C-3115*, 2005 WL 525427 (N.D. Ill. Mar. 4, 2005)); *Stewart v. Nat'l Educ. Assoc.*, 404 F. Supp. 2d 122, 131, 133 (D.D.C. 2005), *aff'd*, 471 F.3d 169 (D.C. Cir. 2006) (explaining when proceeds are plan assets rather than employer assets per the guidance of Department of Labor letter opinions).

[7] *RLJCS Enterprise*, 438 F. Supp. 2d at 910 (citing Dep't of Labor Advisory Op. No. 92-02A, at 2 (Jan. 17, 1992); Dep't of Labor Advisory Op. No. 2001-02A, at 5-6, n.2 (Feb. 15, 2001)); *accord Stewart*, 404 F. Supp. 2d at 130-3.

disability or other occurrence affecting participants or their families. 471 F.3d at 171. The NEA Trust entered into a group life insurance contract with Prudential. The participants paid premiums to the NEA Trust, which in turn made group payments to Prudential. As described above, Prudential eventually demutualized, and the NEA Trust received approximately $17 million in demutualization proceeds. The NEA amended the NEA Trust to permit the demutualization proceeds to be used for the benefit of all participants, whether or not they participated in the Prudential group insurance contract. Stewart brought a putative class action lawsuit claiming that participants had individual rights to the demutualization proceeds. *Id.* at 172.

The D.C. Circuit first determined that ERISA applied to the participant's complaint because of its relation to an employee benefit plan, and that ERISA preempted any state law causes of action asserted in the complaint. Stewart also brought two claims under ERISA. *Id.* at 173. First, Stewart sought benefits under section 502(a)(1) of ERISA (29 U.S.C. § 1132(a)(1)). The district court dismissed this claim, finding that Stewart failed to identify a specific plan term that conferred the benefit in question. *Id.* at 174. Although Stewart conceded that the NEA Trust was the policyholder, he argued that inherent in a policy issued by a mutual company is the right to share in the surplus of the company. In light of these structural assumptions about mutual insurance companies, Stewart claimed an entitlement to the demutualization proceeds as a benefit under the involved employee benefit plan. *Id.* In support of this argument, Stewart relied upon *Ruocco v. Bowman Eichler, Hill, Richards, Inc.*, 903 F.2d 1232 (9th Cir. 1990), which lent support to the equitable notion that premium-paying participants deserve the proceeds of demutualization more than the sponsoring employer. However, the D.C. Circuit found that *Ruocco* did not stand for the proposition that

"premium-paying employees are entitled to a surplus more than a plan on behalf of all employees." 471 F.3d at 174.

Stewart also argued that he lost the "benefit" of converting his coverage under the group contract to an individual insurance policy upon the demutualization. The D.C. Circuit found no basis for this claim because, although the demutualization extinguishes the membership rights of a policyholder, it does not affect, much less terminate, the underlying insurance policy. Accordingly, the D.C. Circuit affirmed the dismissal of Stewart's claim for "benefits." *Id.* at 175-76.

In the context of this case, *Stewart* stands for several significant propositions. First, *Stewart* distinguishes between the rights of beneficiaries and the rights of a contract holder under a group insurance contract issued by a mutual insurance company. *Stewart* held that the designated contract holder (the NEA Trust) had the direct entitlement to the demutualization proceeds, not the individual participants insured under the group insurance contracts.[8] Furthermore, *Stewart* recognized that the participants' rights to the demutualization proceeds were determined by the terms of the governing instrument, the NEA Trust. The terms of the NEA Trust explicitly provided that a surplus could be used to benefit all participants in the NEA Trust, not only those who pay premiums to the involved insurer. The appeals court in *Stewart* did not attempt to re-write the terms of either the group insurance contract or the employee benefit plan by inserting implied or judicially created terms. Rather, the D.C. Circuit followed the terms of the governing documents.

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[8] Significantly, the court in *Stewart* reached this conclusion despite the fact that the participants themselves paid all of the premiums for the purchase of the policies. In the present case, the Annuitants made no payments.

Southwire argued before the district court that BNY's status as contract holder may have reverted to Southwire pursuant to the Southwire Plan's reversion clause, thereby entitling Southwire directly to the Demutualization Proceeds. In response to this argument, the Annuitants themselves acknowledged that "[t]he most straightforward reading of the record is that Irving Trust Company continued on as the contract holder continuously, with a change in name to BNY, up to Prudential's distribution of demutualization proceeds and the filing of this lawsuit." App. 49a. No one argued that the Annuitants became the contract holders or that the parties to the contracts intended such a result. In the end, the court in *Stewart* found that the contract holder, the NEA Trust, was entitled to the demutualization proceeds, which it could dispose of pursuant to the governing trust instrument. This same reasoning should apply to BNY's receipt of Demutualization Proceeds from Prudential and this Court should grant certoriari in this case to resolve the conflict which now exists concerning the proper legal principles applicable in determining the owner of demutualization proceeds flowing from benefit plans.

The decision below also conflicts with *RLJCS Enterprises*, – F.3d –, 2007 WL 1262010. There, the Seventh Circuit enforced the terms of the governing trust instrument to determine the appropriate disposition of demutualization proceeds. Professional Benefit Trust, a multiple employer welfare arrangement, offered various welfare benefits, including death benefits, to the employees of participating employers. Under the terms of the governing trust instrument, upon withdrawal from the arrangement, participating employees would be entitled to their pro rata share of net asset value. This amount specifically excluded the surplus account. Professional Benefit Trust funded death benefits for participant-employees through several group insurance contracts. *Id.* at

*1. Two of these group insurance contracts were with insurers who demutualized. As the designated policyholder on the group annuity contracts, Professional Benefit Trust received the demutualization proceeds. An employer and some of the participant-employees brought a action against Professional Benefit Trust claiming they were entitled to distributions of demutualization as surplus assets. *Id.*

The Seventh Circuit held that, as the designated policyholder, only Professional Benefit Trust had any property right to the demutualization proceeds. *Id.* at *4. The Seventh Circuit also enforced the terms of the governing trust instrument, finding that the trust agreement allowed Professional Benefit Trust to treat the demutualization proceeds as surplus assets and the participant-employees did not prevail in their claim for surplus assets from the plan. *Id.* *RLJCS Enterprises* thus stands for the proposition that when a trustee for an employee benefit plan receives demutualization proceeds as the policy holder or contract holder of a group insurance contract, the disposition of the demutualization proceeds is governed by the governing trust instrument.

In sum, both the Seventh Circuit and the D.C. Circuit followed principles of trust law and applied the terms of the governing trust instrument to settle disputes regarding the disposition of demutualization proceeds. *Stewart*, 471 F.3d at 169; *RLJCS Enters.*, 2007 WL 1262010.

The Sixth Circuit, in stark contrast to these two decisions, (i) flatly ignored the designation of a contract holder and the terms of the governing trust instruments regarding reversion of surplus funds; and (ii) considered only the Group Annuity Contracts, and in doing so, resorted to vague notions of "community standards of fairness" under Section 204 of the Restatement (Second) of Contracts to add judicially created terms, and reached a result directly

contrary to the express provision in the Southwire Plan that any surplus funds be returned to Southwire. The legal principles, analysis and conclusion reached by the Sixth Circuit are markedly different from, and in conflict with, those applied by other Courts of Appeals to determine the disposition of demutualization proceeds. Accordingly, this Court should review and clarify the standards to be applied in demutualization cases.

III. THE MAJORITY DECISION BELOW ERRONEOUSLY IGNORED THIS COURT'S BINDING PRECEDENT CONCERNING PRINCIPLES OF TRUST LAW GOVERNING A TRUSTEE'S DUTIES AS TO THE DISTRIBUTION OF FUNDS COMING INTO ITS POSSESSION.

Hughes Aircraft and other decisions of this Court discussed *supra* on page 4, stand for the proposition that common law trust principles should be applied to determine how to distribute benefit plan assets or surplus. The Sixth Circuit below, however, disregarded this directive and instead looked only to the language of the terms of the annuity contracts to determine the owner of the demutualization proceeds.

The Sixth Circuit majority attempted to overcome its conflict with *Hughes Aircraft* by reasoning that, because the Southwire Plan was terminated before the Demutualization Proceeds came into existence, the funds were not "plan assets" or "plan surplus" and therefore, this Court's holding in *Hughes Aircraft* does not apply. In doing so, however, the majority decision overlooks, as the district court properly recognized, that even though the Southwire Plan had been terminated, "it was still only a trust that Southwire created for the benefit of its employees." App. 40a.

As this Court recognized in *Hughes Aircraft*, employers are generally free under the law to amend, modify or terminate welfare plans. 525 U.S. at 443. In doing so, their actions "are analogous to the settlors of a trust." *Id.* citing *Curtiss-Wright Corp.*, 514 U.S. at 78. In *Spink*, *supra*, this Court held that this rule applies equally to pension benefit plans, such as the one here in issue. 517 U.S. at 891. Because Southwire acted as the settlor of a trust in terminating the Southwire Plan, and because BNY received the proceeds in its capacity as successor-trustee to the Plan, the decision as to who is entitled to the Demutualization Proceeds should be governed by ordinary trust principles.

The Group Annuity Contracts here expressly identify the "contract holder" as "Irving Trust Company, as Trustee for National-Southwire Aluminum Company Pension Plan." App. 33a. The majority decision acknowledges that "BNY received the [Demutualization Proceeds] as successor-in-interest to the former trustee of the [Southwire] Pension Plan." App. 5a. Yet, the majority decision then proceeds with an analysis that completely overlooks the trustee capacity in which BNY received the Demutualization Proceeds and the governing principles of trust law.

Instead, the majority decision starts its analysis with the erroneous assumption that the Irving Trust withdrew as "contract holder" of the Group Annuity Contracts. Based on this erroneous assumption, the majority decision then looks to the language of the Group Annuity Contracts and surrounding circumstances to determine the "intent" of the parties and to name the Annuitants as successor contract holders. In doing so, the majority decision, without explanation, disregards the fact that the Irving Trust held the position of contract holder, as a direct result of its capacity as "Trustee" of the Southwire Plan. Moreover, the majority's determination of the "intent" of the parties is directly contrary to the only evidence of "intent" contained in the

pertinent documents and the record (*i.e.*, the designation of Irving Trust as contract holder in its capacity as trustee of the Plan, and the Plan's express provision that all funds remaining after satisfaction of liabilities to the Annuitants revert to Southwire).

Ordinary trust principles established by this Court's precedent dictate that in administering a trust, a trustee has only those duties imposed or powers conferred by the trust document, along with any implied powers necessary to carry out the purpose of the trust. *See Varity Corp.*, 516 U.S. at 502; *Bruch*, 489 U.S. at 112; *Cent. Transp., Inc.*, 472 U.S. at 570. Fiduciary duties under ERISA "draw much of their content from the common law of trusts." *Varity Corp.*, 516 U.S. at 502. Under ordinary trust law, to administer a trust is to perform the duties imposed, or exercise the powers conferred, by the trust document. *Id.*

Applying these principles of the common law of trusts, the extent of the Annuitants' interests in any assets held by BNY in its capacity as successor to the Plan's trustee depends upon the manifestations of Southwire's intent as the trust's settlor – an intent that can be ascertained from the plain language of the Southwire Plan which provides for the reversion of surplus funds. *See, e.g., Clay v. Crawford*, 183 S.W.2d 797, 804 (Ky. 1944) (determination of the parties' intent is to be obtained "from the language employed ..."). Notably, the Southwire Plan provides for reversion of "any funds." For this reason, the district court correctly held that the Demutualization Proceeds revert to Southwire, which created and solely funded the trust which purchased the Group Annuity Contracts. *See* App. 40a.

Accordingly, this Court should grant review of the majority decision and hold that the principles of trust law established by this Court determine the rights of a settlor that has established a trust to fund an employee benefit plan.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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